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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 373

FRED STROBLE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF
CALIFORNIA

BRIEF FOR PETITIONER

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The Opinion Below

The Opinion of the California Supreme Court was filed on January 19, 1951. It is reported in 36 Cal. (2d) 615, 226 P. (2d) 330 (1951) (R. 407). The Opinion is separately set forth in the record.

Jurisdiction

The jurisdiction of this Court was invoked under 28 U. S. C. 1257 (3); the Petition for Writ of Certiorari was granted on October 8, 1951 (343 U. S. —).

Statement of the Case.¹

Petitioner Fred Stroble is a 68-year-old male of weak and impaired mentality² (R. 410-411). On November 14, 1949, the date upon which Stroble is alleged to have killed a six-year-old child, there was outstanding a warrant for his arrest on a misdemeanor morals charge. On November 14, 1949, petitioner disappeared, and one of the most publicized and extensive manhunts in California history was begun.³ The hunt continued until petitioner was identified in a bar in Los Angeles by a private citizen, William Martin Miller (R. 75). Miller summoned aid in the person of a uniformed police officer, Arnold W. Carlson (R. 75). Petitioner was then taken to the office of the park foreman in Pershing Square (a park in downtown Los Angeles). Petitioner was questioned regarding his guilt (R. 80); he evidenced a reluctance to speak, and he was then threatened, slapped, kicked, and conditioned for future "interrogation"³ (R. 75-78). In company with Carlson and some officers from the homicide bureau of the Los Angeles Police Department, petitioner was taken to the Wilshire Police Station, where he was met by Sergeant W. H. Brennan of the Wilshire Detective Bureau, which officer had on a prior day obtained a warrant for the arrest of petitioner. This warrant was still valid and in effect at the time of arrest. (R. 60). Officer Brennan, in violation of the clear mandate of the warrant, took petitioner to the office of the District Attorney of Los Angeles County, on the sixth floor of the

¹ The opinion of the California Supreme Court does not set out the facts of this case in either chronological or sequential order. Rather, the facts are related in individual groupings as the court disposes of unrelated questions of law concerning these facts. Petitioner herein has endeavored to place the facts in the order of their occurrence, with supplemental references to the California Supreme Court opinion where such collaboration was felt necessary.

² California Supreme Court Opinion, R. 416.

³ California Supreme Court Opinion, R. 415.

Hall of Justice, where he was conducted into the office of William E. Simpson, District Attorney.⁴ (R. 60). It was conceded by the representatives of the People, that a magistrate was available on the floor above the District Attorney's office and that there was a court open and available to which Stroble could have been taken and advised of his rights, before he was taken to the office of the District Attorney (R. 270).

Here in the presence of 19 members of the District Attorney's office and the Los Angeles Police Department, and a number of stenographers, Stroble was interrogated for a period of approximately two hours (R. 62-63, 272). During and after the completion of this interrogation of petitioner, releases were given to the press by the District Attorney, Mr. Simpson, which statements were given widespread publicity by the press. (Exhibit "AA," R. 361)⁵ During this period of interrogation Attorney John D. Gray, who had previously represented petitioner in a misdemeanor morals case and who was known to the District Attorney as petitioner's attorney, demanded the right to communicate with Stroble at the request of his family; for the stated purpose of consulting with him and advising him of his constitutional rights.⁶ Gray was at that time in the anteroom of the Dis-

⁴ California Penal Code, Section 814 prescribes the form of the warrant: "You are . . . commanded forthwith to arrest the above named C. D. and bring him before me—or . . . before the nearest or most accessible magistrate in this County."

⁵ It is the understanding of counsel that these exhibits have been transmitted by the Clerk of the California Supreme Court to the Clerk of the United States Supreme Court.

⁶ This right is guaranteed to a defendant by California Penal Code Sec. 825, which reads: "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; and, after such arrest, any attorney at law entitled to practice in the courts of record of California may at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner, so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor . . ."

district Attorney's office, where petitioner was being questioned (R. 176-180). The demand to see Stroble was unequivocally denied; the attorney was told by a high ranking police officer, "Why don't you go on home and come back tomorrow, and let's do this thing right?" (R. 178). Approximately one and one-half hours later petitioner was rushed past this still waiting attorney (R. 179) and taken to the office of Marcus Crahan, physician in charge of the Los Angeles County Jail Hospital, and subjected to a complete physical examination, and was again interrogated at length by Dr. Crahan (R. 148). Some time thereafter petitioner was taken to the Los Angeles County Jail, where at approximately 9:30 P.M. of that evening his attorney, John D. Gray, was first permitted to see him⁷ (R. 180).

The following day, Friday, November 18, 1949, at 10:00 A.M., petitioner was arraigned (R. 275); the City Public Defender was appointed as his counsel (R. 275), and on Monday, November 21, 1949, the case was called for preliminary examination in Division 4 of the Municipal Court of the City of Los Angeles (R. 276). Petitioner was bound over for trial in the Superior Court of the State of California in and for the County of Los Angeles. Petitioner was arraigned in the last-named court, the *County* Public Defender appointed as his counsel, and Deputy Public Defenders Matthews and Hill assigned to the case.

The case came on for trial, before a jury, on January 3, 1950, and was tried until January 18, 1950, at which time the jury commenced its deliberations. On January 19, 1950, the jury found petitioner guilty of murder in the first degree without recommendation, and the case was adjourned until the following day for the commencement of the sanity aspect of the trial.

⁷ California Supreme Court Opinion, p. 417.

At the commencement of that portion of the trial bearing on the issue of Stroble's sanity,⁸ Deputy Public Defender Matthews, proceeding alone (R. 223), in the absence of Deputy Hill, sought to interrogate one of the jurors on voir dire, concerning certain suspected improper conduct on the part of a juror (R. 222-224). The trial judge made and sustained his own objection, summoned Matthews' superior, held a long session in chambers, criticized Matthews' conduct, and removed Matthews from further participation in the trial of the case,⁹ as far as any effective aid to Stroble is concerned (R. 371-394). Shortly thereafter petitioner was advised by Matthews' superior, Public Defender Ellery Cuff, to whom Stroble had just been introduced, to waive the jury and to submit the matter to the trial judge for decision. This was done without consulting Matthews (R. 336), who had been Stroble's counsel throughout the case. Mr. Hill, who had never spoken to petitioner, reappeared in the case and entered into certain stipulations with the prosecution (R. 225-228), and petitioner was, without the taking of any evidence, summarily found sane by the Court (R. 227). The time for sentence was set for January 27, 1950, at 9:00 A. M. (R. 228). On January 22, 1950, petitioner substituted John D. Gray as his attorney in the place of the Public Defender (R. 301).

Motions for new trial, arrest of judgment, to dismiss the proceedings for lack of jurisdiction, and to set aside the waiver of the jury in the trial of the issue of Stroble's

⁸ California Penal Code Section 1026 provides for a trial divided into two distinct parts, when a criminal pleads "Not guilty," and "Not guilty by reason of insanity." In that case, the defendant is tried first on the issue of guilt, and in that portion of the trial is conclusively presumed sane. If he is found guilty, he is then tried on the issue of sanity. That portion of the trial on the issue of sanity may be before the original jury or a new one, in the discretion of the court.

⁹ California Supreme Court Opinion, R. 423.

sanity, were denied on February 6, 1950, and the defendant sentenced to death. Thereupon an appeal was undertaken automatically to the Supreme Court of the State of California pursuant to California Penal Code Section 1239. The judgment of the trial court was affirmed on January 19, 1951, and a petition for rehearing denied on February 15, 1951.

Specification of Errors

1. Petitioner was denied Due Process by the Supreme Court of California when it failed to reverse the conviction because the trial was unfairly prejudiced by inflammatory newspaper reports inspired by the District Attorney.

2. Petitioner was denied Due Process by the Supreme Court of California when it failed to reverse the conviction based, in part, on an admittedly coerced confession.

3. Petitioner was denied Due Process by the Supreme Court of California when it failed to reverse the conviction because petitioner had been effectively deprived of counsel in the course of the trial, at the behest of the trial judge.

4. Petitioner was denied Due Process by the Supreme Court of California when it failed to hold that the following combination of prejudicial and illegal circumstances:

- a) Unwarranted delay in arraignment;
- b) Refusal to permit counsel to consult defendant;
- c) Deprivation of counsel of petitioner's choice at a critical point in the trial, at the instigation of the trial judge (independently a violation of Due Process);
- d) Admission of a coerced confession into evidence (independently a violation of Due Process);
- e) A lynch atmosphere created by newspaper stories "planted" by publicity-seeking prosecuting officers (independently a violation of Due Process);

deprived petitioner of a fair and impartial trial, and denied him Due Process.

Summary of Argument

This Court is faced once again with the necessity of reversing a State court conviction because of wholly improper methods used by the prosecution to obtain that conviction. Certain of the contentions raised here, such as those concerning the use of a coerced confession and the deprivation of counsel, are familiar and can be fit into the pattern of many previously decided cases.

The admission of an admittedly coerced confession requires reversal of a conviction based upon it. The California Supreme Court "assumed as a matter of law under the circumstances shown" (R. 416) that the petitioner's confession was coerced. Yet it chose to weigh the evidence embodied in the transcript of testimony and to evaluate its effect on the judge and jury. The California court concluded that the introduction of subsequent confessions, which were not coerced, repaired the damage done to petitioner's case by the introduction of the confession obtained under coercive circumstances. Petitioner contends that the introduction of a coerced confession must be considered error sufficiently prejudicial to require reversal.

Petitioner was also effectively deprived of counsel. The Public Defender¹⁰ was appointed to represent Stroble and a deputy from his office assigned to act as Stroble's counsel. In the course of the bifurcated trial provided by California criminal procedure for defendants who tender an issue of not guilty by reason of insanity, the trial judge successfully importuned the Public Defender to withdraw the deputy who had represented petitioner and, in effect, to substitute another deputy. Thus, at the close of the trial of guilt or

¹⁰ Section 27700 *et seq.* of the California Government Code authorizes counties to establish an office of Public Defender to represent indigent persons accused of crime, among other duties. Such an office has been created for Los Angeles County and has been in existence since 1914.

innocence and just before the trial of the issue of insanity, this new counsel undertook to advise petitioner without thorough preparation, or knowledge of the case or the testimony in the first portion of the trial. Petitioner was thereby deprived of effective counsel at a key point in the trial and is entitled to a new trial wherein he will be zealously represented by a continuing prepared, effective advisor throughout.

Petitioner's other contentions are more inchoate and less familiar, but at least of equally fundamental legal and social import. Petitioner asserts that the newspaper, radio and television hue and cry incident to his arrest and trial, salient portions of which were instigated by the prosecution, deprived him of a fair and impartial trial. It is contended that recent developments in the techniques and law of mass communication have created a need for the recognition in these contexts of certain long established legal principles. An accused has always been entitled to keep evidence obtained by coercion from the jury *during trial*. Should he not be permitted to keep the same evidence from the jury (or all potential jurors) *before the trial*? Similarly, unduly prejudicial statements have long been forbidden to the prosecution in the courtroom. But jurors whose emotions and prejudices are evoked by prosecution-planted newspaper stories *before the trial* cannot acquire objectivity by entering the jury box. Petitioner could not have obtained a fair trial from a jury selected from individuals necessarily exposed to the merciless, inflammatory and deliberate publicity campaign waged against him.

Finally, this Court is asked also to recognize that law "enforcement" officers have become learned in the law. The police have carefully studied and learned the lessons of recent Supreme Court decisions in the field of civil liberties. These sophisticated and well-meaning officers then try to

stay within the broad confines of the latest constitutional decisions, with bland disregard of the lesser rights of defendants thought to be assured only by statute and state sanctions. We squarely challenge the view that a fair trial is granted and Due Process followed when a multitude of "lesser" transgressions are knowingly committed by over-anxious and over-ambitious prosecutors. We contend that this record reveals a fatal combination of illegal procedures, even if no one of them justifies reversal in itself.

ARGUMENT

I. Defendant Was Convicted Without Due Process Because of the Inflammatory Newspaper Reports Based in Large Part on Information and Prejudicial Statements Furnished by the District Attorney Before the Trial.

In recent years, this Court has gone far in protecting the right of newspapers to make comment—"vitriolic, scurrilous or erroneous"¹¹—concerning pending litigation, without thereby risking conviction of contempt of court. (*Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331, 370 (1946); *Craig v. Harney*, 331 U.S. 367 (1947).) Indeed, there is room for disagreement by reasonable men concerning the wisdom and correctness of the above cited cases.¹² But these cases must be accepted as stating the law, and this case involves no challenge to the wide latitude therein given to newspapers in their treatment of controversial and other newsworthy litigation.

Rather, petitioner urges that this Court, having assured constitutional protection for the power of the press to re-

¹¹ *Pennekamp v. Florida*, 328 U.S. 331, 370 (1946) (Concurring Opinion of Justice Murphy).

¹² Chief Justice Stone and Justices Roberts, Frankfurter and Byrnes dissented in *Bridges v. California*; Chief Justice Vinson and Justices Frankfurter and Jackson dissented in *Craig v. Harney*.

port and comment on litigation, now must recognize and reaffirm the *correlative* constitutional right of individual litigants, particularly defendants charged with crime, to be protected from the results of abuse of that power. The concept of Due Process is centered on the institution of fair and impartial trial. This Court must now recognize that the media of mass communication, in the exercise of their fundamental freedom to disseminate the news, can infringe on the right of an accused defendant to a fair and impartial trial. In this case, the newspapers were led into that error by the publicity-seeking prosecution.

Judges cannot summarily silence comment concerning litigation, absent a "serious and imminent threat to the administration of justice".¹³ But this rule, based on the guaranties of the First Amendment, does not mean that a criminal trial can be made a prosecution by public clamor, and the Fourteenth Amendment vitiated.

In his concurring opinion in *Pennekamp v. Florida*, 328 U. S. 331 (1946), Mr. Justice Frankfurter has stated with effectiveness which requires quotation, the general considerations concerning discussion of pending litigation in publicity media. His statement of position regarding "trial by newspaper" is adopted in aid of argument here:

" 'Trial by newspaper', like all catch phrases, may be loosely used but it summarizes an evil influence upon the administration of criminal justice in this country . . .

"Certain features of American criminal justice have long been diagnosed by those best qualified to judge as serious and remediable defects. On the other hand, some mischievous accompaniments of our system have been so pervasive that they are too often regarded as part of the exuberant American spirit. Thus, 'trial by newspapers' has sometimes been explained as a con-

¹³ *Craig v. Harney*, 331 U.S. 367, 373 (1947).

cession to our peculiar interest in criminal trials. Such interest might be an innocent enough pastime were it not for the fact that the stimulation of such curiosity by the press and the response to such stimulated interest have not failed to cause grievous tragedies committed under the forms of law. Of course trials must be public and the public have a deep interest in trials. The public's legitimate interest, however, precludes distortion of what goes on inside the courtroom, dissemination of matters that do not come before the court, or other trafficking with truth intended to influence proceedings or inevitably calculated to disturb the course of justice. The atmosphere in a courtroom may be subtly influenced from without.

"The administration of law, particularly that of the criminal law, normally operates in an environment that is not universal or even general but individual. The distinctive circumstances of a particular case determine whether law is fairly administered in that case, through a disinterested judgment on the basis of what has been formerly presented in the courtroom on explicit considerations, instead of being subjected to extraneous factors psychologically calculated to disturb the exercise of an impartial and equitable judgment. . . .

" . . . It is a condition of that [judicial] function—in dispensable for a free society—that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertow of extraneous influence. In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote."

(328 U.S. at 359-366).¹⁴

¹⁴ Cf. The challenging comments by Justice Frankfurter in his opinion respecting the denial of petition for writ of *certiorari* in *Magyland v. Baltimore Radio Show*, 338 U.S. 912 [1950].

This case involves not only the factor of inflammatory, prejudice-arousing newspaper reports, but also the furnishing to the papers of the detailed basis of those reports by the Chief Prosecuting Officer, the District Attorney. In another opinion delineating the effect of unwarranted newspaper publicity, Mr. Justice Jackson for his concurring opinion in *Shepherd v. Florida*, 341 U. S. 50 (1951), joined by Mr. Justice Frankfurter, has commented with respect to a similar situation:

"It is hard to imagine a more prejudicial influence than a press release by the officer of the court charged with defendants' custody stating that they had confessed, and here just such a statement, unsworn to, unseen, uncross-examined and uncontradicted, was conveyed by the press to the jury." (341 U. S., at 52.)

Cf. *Viereck v. U. S.*, 318 U. S. 236, 248 (1943).¹⁵

¹⁵ In this case, Chief Justice Stone cites and quotes from *Berger v. U. S.*, 295 U. S. 78, 88 (1935), in which Mr. Justice Sutherland eloquently defined the position of the prosecutor in a criminal case:

"The United States Attorney [or other prosecuting official] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one . . .

"Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. Compare *New York C.R. Co. v. Johnson*, 279 U. S. 310, 316-318, 73 L. ed. 706, 709, 710, 49 S. Ct. 300."

This type of prosecution-instigated newspaper discussion of pending litigation has also been condemned by the organized Bar.¹⁶

In most cases, it would be very difficult to determine the point at which, in the absence of a concrete showing of actual bias and prejudice, the newspaper accounts of a particular criminal matter would deprive the defendant of a fair trial. Many factors would be relevant; included would be: The emotional tone of the reports; the circulation of the papers; the "treatment" of the stories by the press; the nature of the crime; the time intervening between the reportage and the trial. Even though such a decision is a matter of degree, this Court could properly conclude that Due Process had not been given (cf. *Moore v. Dempsey*, 261 U. S. 36 (1923); *Craig v. Harney*, 331 U. S. 367 (1947).)¹⁷

But when the prosecutor here deliberately encouraged and pandered to the bloodthirsty, sex-obsessed public prints, the trial descended to the level of the Roman Circus. The Los Angeles Times reported the period of Stroble's questioning following arrest, in part, as follows ("OC 'Home' Edition, November 18, 1949, page 2, column 4, Exhibit 'AA'):

"CONFESSION SCENE STEEPED IN DRAMA

FBI Men Attend

"The drama began at 12:40 p. m. when Stroble, handcuffed, was hustled up a back elevator and brought down the marble floored and marble walled corridor

¹⁶ See in addition to the numerous authorities cited by Mr. Justice Frankfurter in his concurring opinion in *Pennick v. Florida*, *supra*, Canon No. 20 of the Canons of Legal Ethics of the American Bar Association.

¹⁷ As Justice Reed stated in the *Craig* case, at p. 375: "Conceivably, a plan of reporting on a case could be so designed and executed as to poison the public mind, to cause a march on the court house, or otherwise so disturb the delicate balance in a highly wrought situation as to imperil the fair and orderly functioning of the judicial process."

when he arrived from Wilshire police station. Inside the 'corner pocket,' the stage had been set. Four FBI agents, who have a complaint against Stroble for illegal flight, lurked in the background.

"Stroble came through perhaps 300 spectators in the corridor. He looked on sullenly while literally scores of newspapermen's flashbulbs popped. He wore a gray suit, a dull green shirt, a purplish tie.

"Once inside the room, Dep. Dist. Atty. Henderson began the questioning slowly but relentlessly. Every half hour, Dist. Atty. Simpson came out a back door to tell the progress.

Defendant Hesitant

"At about 2:15 p. m., Simpson said, 'We're getting up to the crucial point. He's a little bit hesitant. I think he is going to come through. I don't think there's any doubt about it.'

"Simpson, white-haired, was trembling.

"Television news cameras were trained on the corridor. Radio broadcasts were made a few feet away. All telephones in offices for 50 feet in each direction were commandeered by newsmen.

Death Described

"Minutes ticked off. Simpson emerged again. He told in words of almost Biblical simplicity of Stroble's confession—the attempted molesting, the choking, the dragging, the ice-pick stabbing, the ax-bludgeoning and finally the coup de grace, the knifing at the back of the skull which he had learned while watching a bullfight.

"Inside the 'corner pocket' stenographers took notes in five-minute relays and a recording machine also was used.

"'I don't know how long this will continue,' Simpson said. 'We want to be sure. We want to be sure.'"

The less conservative press, like the Hearst-owned Los Angeles Herald Express, printed the confession, and head-

lined the capture of Stroble in letters two and three-eighths inches high and three-quarters of an inch wide (Los Angeles Herald Express, Night Final, November 17, 1949). Nor was the coverage of the Stroble case a brief interlude lost in the mass of the news and without the mnemonic advantages of constant repetition over a period of time. The following night the Herald Express announced in headlines of a size reserved by the New York Times for the Second Coming,

"LYNCH HIM! HOWLS CROWD.
AS STROBLE GOES TO COURT"

The same paper had dubbed the petitioner "The Werewolf" many days before his capture and many weeks before his conviction.

Nor was the journalistic vilification of Stroble ended by his arrest. The night edition of the Herald Express of November 21, 1949, carried on its front page the following account, with the subhead "Grisly Details Revealed":

"The complete Answer and Question text of Werewolf-slayer Fred Stroble's confession to the fiendish murder of six-year-old Linda Joyce Glucoft was released by District Attorney William E. Simpson today; [followed by the complete text of the confession]."

Nor did petitioner escape the attention of the Los Angeles Examiner, or the Los Angeles Daily News, the other major morning and evening newspapers, respectively, of Southern California. Stroble was a cause celebre; all four of the major newspapers named above carried the details of the initial, concededly inadmissible confession obtained by the District Attorney.

Thus, it would have been difficult for any literate individual exposed in any way to the newspapers of the area to

have failed to form a prejudgment of the petitioner's guilt before his "trial".¹⁸

The District Attorney, for reasons of his own, encouraged the widest publicity and most intemperate reportage concerning the arrest of Stroble. The treatment afforded the death of Linda Joyce Glucoft and the search for her killer was unique even in Hollywood, where the glare of publicity is ever present. The prosecutor tried and convicted petitioner in the public prints, even before he arraigned him in the California courts. By doing so, he effectively prevented the petitioner from obtaining a fair and impartial trial.

II. Admission of an Admittedly Coerced Confession Requires Reversal of a Conviction Based Upon It, Even Though Evidence Apart from This Confession Might Have Sufficed to Justify the Jury's Verdict.

The uncontradicted testimony in the record before this Court sets forth a clear-cut example of a coerced confes-

¹⁸ According to the Audit Bureau of Circulation, the authoritative source of information concerning the circulation of the American newspapers, as quoted in Editor and Publisher for 1950-51, the week-day circulation of the four newspapers named for the quarter ended September 30, 1949, was:

TIMES	385,583
HERALD EXPRESS	358,921 (every week-day except Saturday)
EXAMINER	357,453
DAILY NEWS	251,232

Thus, the aggregate circulation of these newspapers on week-days exceeds 1,300,000. The effect and coverage of radio and television can only be speculated upon.

See in this connection, the comments of the English judiciary in the concurring opinion of Justice Frankfurter in *Pennickamp v. Florida*, 328 U.S. at 357-59 (1946).

sion, as conceded by the California Supreme Court.¹⁹ In the brief, seventy-minute period between the arrest of petitioner and the time he started confessing the police officer in whose custody petitioner was held waved a blackjack under his nose and kicked him in the shins.²⁰ The policeman then stood by while a uniformed park officer slapped the 68-year-old petitioner, a man of admittedly weakened mentality; and knocked off his glasses.²¹ Petitioner was then whisked into a car and hustled into a room that contained 19 police officers and members of the District Attorney's staff, in addition to five stenographers working in relays. Then began petitioner's two-hour-long confession.

It is apparent, then, that this confession resulted from fear and intimidation. This Court has held repeatedly that

¹⁹ *People v. Stroble*, R. 416:

"We may assume that, as a matter of law under the circumstances shown, this first confession was the result of physical abuse or psychological torture or a combination of the two (*cf. Watts v. Indiana*, (1949), 338 U. S. 49 [69 S. Ct. 1347, 93 L. Ed. 1801]; *Turner v. Pennsylvania* (1949), 338 U. S. 62 [69 S. Ct. 1352, 93 L. Ed. 1810]; *Harris v. South Carolina* (1949), 338 U. S. 68 [69 S. Ct. 1354, 1357, 93 L. Ed. 1815], reversing convictions because of the admission of confessions elicited after intensive questioning by relays of officers for hours a day over periods of days). We may further assume that from the record it appears as a matter of law that defendant, although legally sane, was of somewhat weakened mentality (the result of arteriosclerosis and the excessive use of alcohol), and that this first confession was the result of terror indubitably following from the slap by the park foreman, the repeated acts of battery by the arresting officer when he searched defendant, and the presence of 19 law enforcement officials and five stenographers while defendant was questioned. The introduction in evidence of such a confession, if it were material at all, would offend the due process clause of the Fourteenth Amendment. (See *Ashcraft v. Tennessee* (1944), 322 U. S. 143, 154 [64 S. Ct. 921, 88 L. Ed. 1192]; *Haley v. Ohio* (1948), 332 U. S. 596, 599 [68 S. Ct. 302, 92 L. Ed. 224]; see also *Foster v. Illinois* (1947), 332 U. S. 134, 137 [67 S. Ct. 1716, 91 L. Ed. 1955]; *Gibbs v. Burke* (1949), 337 U. S. 773, 781 [69 S. Ct. 1247, 93 L. Ed. 1686].)" (Emphasis added.)

²⁰ *People v. Stroble*, *Ibid.*

²¹ *People v. Stroble*, *Ibid.*

such a confession is "one on which we could not permit a person to stand convicted for a crime."²²

The introduction into evidence of this coerced confession was followed by the admission of five subsequent "confessions." The existence of these latter statements—whether or not they amounted to confessions, and, if they did, whether or not they were given voluntarily—cannot remove from this record the stigma that resulted from the use of the coerced confession. This legal theory is illustrated in the case of *Palakiko v. Hawaii*, 188 F. (2d) 54 (C. A. 9th, 1951). The appellants in that case were convicted of murder in the trial court. Three distinct confessions were made by one of the appellants, who contended, on appeal, that the first two of these were obtained in a fashion that violated his constitutional right to due process under the Fourteenth Amendment.

Discussing this claim, the court said:

"The contention as to the improper inducements require consideration only as they relate to the first two of the three statements made by Majors. Although the complete record of the evidence . . . might disclose sufficient evidence apart from these earlier confessions to warrant conviction, yet if the admission of these earlier confessions denied a constitutional right to Majors, the error would require reversal. We must therefore examine the claim that Majors' first confession or second confession or both were received under circumstances of such irregularity and unfairness as to amount to a denial of due process." (Emphasis added.)²³

But we are met with the opinion of the California Supreme Court that this confession was not material in proving

²² *Malinski v. New York*, 324 U. S. 401, 407 (1945).

²³ *Palakiko v. Hawaii*, 188 F. (2d) 54, 57 (1951).

the ultimate question of plaintiff's guilt.²⁴ Such a conclusion is difficult, if not impossible, to justify in this instance. The reading of Stroble's coerced statement occupied some 94 pages of the trial court transcript.²⁵ After this reading the statement was again repeated to the jury by means of a wire recorder playback.²⁶

On the other hand, the five subsequent "confessions" mentioned by the California Supreme Court came as incidental statements in the course of psychiatric reports, occupied but a few pages in the record, and were not regarded as confessions at all by either court or counsel.²⁷

This Court has recently reaffirmed the proposition that "the use of any confession obtained in violation of due process requires the reversal of the conviction, even though unchallenged evidence, adequate to convict, remains."²⁸ To allow a constitutional violation to be put into the category of error not justifying reversal, would permit state courts to undermine the guaranties of the Federal

²⁴ *People v. Stroble*, R. 416:

"But here the use of the first confession could not have affected the fairness of the defendant's trial; because defendant thereafter made at least five confessions, of materially similar substance and unquestioned admissibility, which were put in evidence. It does not appear that the outcome of the trial would have differed if the first confession had been excluded, nor does it appear that the coercive influence surrounding the first confession continued to operate on the mind of defendant and induce subsequent confessions which were made after defendant had consulted with counsel and been taken before a magistrate (cf. *People v. Jones* (1944), 24 Cal. (2d) 601, 609 [150 P. (2d) 801])."

²⁵ R. 80-138.

²⁶ R. 146.

²⁷ These "confessions" consisted of disclosures made during psychiatric examinations, said disclosures being set forth in the testimony of Dr. Jacob Peter Frostig, R. 189; Carl G. G. Palmberg, R. 190, 197; Dr. Edwin E. McNeil, R. 214; Dr. Victor Parkin, R. 217-220; Dr. Robert E. Wyers, R. 222.

²⁸ *Gallegos v. Nebraska*, 342 U. S. —, 20 Law Week 4025 (Nov. 26, 1951); *Stromberg v. California*, 283 U. S. 359, 368 (1931); *Bram v. U. S.*, 168 U. S. 532, 540 (1897).

Constitution. Thus the California Supreme Court may not brush aside the use of a coerced confession by deemphasizing its materiality where the very fact of coercion is what makes obnoxious any conviction based upon such a confession. As this Court has said:

"The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. The criteria for decision of that question may differ from those appertaining to the State's rule as to admissibility of a confession."²⁹

III. Petitioner Was Effectively Deprived of Counsel at a Key Point in the Course of the Trial, at the Behest of the Trial Judge.

From the time of arraignment to the time of the filing of this appeal, the petitioner has had as attorneys of record, not one, but four counsel consecutively, at least two of whom at various stages of the proceedings demonstrated a zealous and sincere concern for the protection of all of the rights of the defendant and who labored ably and conscientiously on his behalf.

The vice in the situation, however, lies in the fact that none of these attorneys continuously and actively participated in this case as Stroble's counsel. At one or

²⁹ *Lisenba v. California*, 314 U. S. 219, 236 (1941). See also *Rochin v. California*, 96 L. Ed. Adv. Ops. 154, 159 (1951), where Mr. Justice Frankfurter wrote:

"Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society."

more vital stages in the proceeding, no one of the four represented Stroble in a fashion which, even to an uncritical eye, would show a proper discharge of the obligation of the State to provide Fred Stroble with the effective aid of counsel at *every* stage of the proceeding.

Powell v. Alabama, 287 U. S. 45 (1932).

GRAY'S PART AS COUNSEL.—Mr. John Gray, petitioner's present counsel, was substituted for the Public Defender after conviction by the jury and the trial court's finding that Stroble was sane at the time of committing the crime (R. 227, 299). Gray's participation in the case, therefore, however diligent, could not serve to cure any fundamental defect in the proceedings to that point.

HILL AS PURPORTED COUNSEL.—Deputy Public Defender Hill had been assigned by Ellery Cuff, the Public Defender, to conduct the defense along with Deputy Public Defender Al Matthews. An examination of the record, however, and particularly of the statements of Stroble and the Court, discloses that, with the exception of Hill's participation in the argument to the jury and the preliminary examinations, he was not considered, either by the court or by Stroble, to be "the effective counsel" for petitioner. Nor did Hill consider himself to be Stroble's counsel; Hill *never spoke to Stroble* during the trial, not even concerning the waiver of jury trial on the issue of sanity.³⁰

³⁰R. 348:

"Q. Did Al Matthews ever talk to you about getting rid of the jury?"

"A. He never did."

"Q. Did Mr. Hill ever talk to you about getting rid of the jury?"

"A. Mr. Hill never spoke to me, *not one word all during the trial*; not even look at me. He always turn his face at me."

R. 357:

"Mr. Gray: . . . Now the statement of Mr. Hill, I think from the very face of the statement, shows that he had not talked with the defendant concerning this waiver.

"The Court: I think the record shows that."

CUFF AND MATTHEWS AS PURPORTED COUNSEL.—The court stated repeatedly that the real counsel in the case, the man whose constant and pervading presence validated the removal of Al Matthews at a vital juncture in the trial, was Ellery Cuff, the Public Defender.

The Record on the hearing of the motion for new trial indicates the views of the trial judge, as follows (p. 324):

“Mr. Gray: Is it your Honor’s ruling that Mr. Cuff is counsel in this case?”

“The Court: Mr. Cuff, the Public Defender of Los Angeles County, has been counsel in this case from the very inception of the case. . . .”

Again, at p. 325:

“Mr. Gray: Excuse me, Mr. Alexander, at this time, Your Honor, it is your Honor’s ruling that Mr. Cuff was counsel in this case?”

“The Court: Yes, he was appointed at the very inception of the case. . . .”

Petitioner wishes to emphasize the fact that the Deputy Public Defender, Al Matthews, during the course of the jury trial on the murder charge conducted the defense with energy and diligence, and the confidence engendered by his work is attested to in the words of the petitioner on the motion for new trial.³¹ Nor is there any question

³¹ p. 347, Rec. on App.:

“Q: Now, will you state what Mr. Cuff said to you when he came back to the prisoner’s room?”

“A. Mr. Cuff came in and he told me, he said ‘Fred’ he said ‘I am going to send Al on a vacation and I am going to take over’. When he said that, then, that was I know I was lost, because Al knows I had lots of confidence in Al.”

p. 350:

“A. I was nervous anyhow, I didn’t hardly give any attention to the whole thing because I was lost when I didn’t see Al with me.”

that petitioner was under the impression that Matthews was his attorney and the person on whom he relied for counsel and advice.³²

We have, then, the anomalous and probably unprecedented situation of a trial for a capital offense wherein the defendant was under the impression that his counsel was one man, and the trial court believed his counsel to be another.

Cuff's Participation

If, in California, an indigent defendant charged with crime may be required to accept a state agency—the office of Public Defender—as his counsel, rather than an individual attorney, the record in this case shows that the Public Defender, Ellery Cuff, the counsel designated by the court, failed to discharge the obligations (of an attorney to a client) placed upon him.

This Court and other courts delineating the constitutional requirements, have tested the existence of effective aid of counsel by the following criteria:

A. Whether and to what degree counsel was familiar with the facts and the law in the case.

B. Whether on the record it appears that counsel was able to give all or substantially all of his time to the case.

C. Whether counsel, before offering his opinion as to what defendant should do, has properly prepared himself by “an independent examination of the facts, circumstances and laws involved.”

³² p. 346 (In addition to testimony quoted under 31 above):

“Q. You are acquainted with Al Matthews, are you not?”

“A. Yes.

“Q. Now, he *was* has been your attorney in connection with the defense of this action.

“A. From the beginning up to the insanity trial.”

D. Whether before making any determination concerning the course of conduct of the defense there has been a reasonable period and opportunity of consultation between the accused and his counsel.

Von Moltke v. Gillies, 332 U. S. 708, 728 (1948);
House v. Mayo, 324 U. S. 42, 46 (1945);
Shores v. U. S., 80 F. 2d 942, 947 (C. A. 9th, 1935);
People v. Gordon, 30 N. Y. S. 2d 625 (App. Div. 2d Dept., 1941).

The record indicates without dispute that Cuff's participation in this case violated not one, but all four of these precepts.

Cuff's own testimony belies any real familiarity with this case. In testifying on the motion for new trial, he said: (All emphasis added.)

R. 929:

"Q. Now, what portions of the daily transcript of those proceedings had you read?

"A. Well, I don't know—considerable portions when I could get my hands on them.

Again, at p. 330:

"Q. Now, Mr. Cuff is it not true that to your knowledge, Mr. Matthews kept this daily transcript with him at all times?

"A. Yes, that is right. Sometimes he would leave it on his desk and I went in and read it.

"Q. You mean during the lunch hour.

"A. Yes, and I would go in and read it portions of it; but then I would have the report from Mr. Matthews as to what each witness had said and what witnesses we had."

And at p. 330:

"... I will say that I did not contact all those witnesses and possibly did not read the testimony of all

those witnesses; but I did talk to Mr. Hill and to Mr. Matthews as to what had been testified to."

The trial lasted nineteen days. That Cuff did not give all or even substantially all of his time to the case, again is evident from his own testimony on the motion for new trial:

R. 330:

"Q. Now Mr. Cuff, is it not true that for a period of time of approximately five days to a week during the trial of this action, you were not present in Los Angeles?

"A. That is right. I came back here on Friday, the first Friday in January I believe."

The foregoing excerpts also make it clear that in advising Stroble on the question of waiving a jury trial on the plea of insanity Cuff did not make "an independent examination of the facts, circumstances and laws involved." (*Von Moltke v. Gillies, supra.*)

And, finally, that the consultations with petitioner were of such short duration as to completely rebut any argument of adequacy in this respect is abundantly clear again from Cuff's own words:

R. 328:

"Q. Mr. Cuff, when did you first meet the defendant Fred Stroble?

"A. Either that morning (the day of the trial on the question of insanity) or the morning before. I forget which it was, to talk to him."

And at p. 331:

"Q. The court did not take a recess for the purpose of allowing you to confer with Mr. Stroble?

"A. No."

"Q. Approximately how long did your conversation with Mr. Stroble take on that afternoon?

"A. Oh, I would say between five and ten minutes."

Cuff could not have believed that he was fulfilling his duty toward the petitioner by conferring with him for, at most, a ten-minute period in helping him to make such a vital determination. That Cuff knew his own shortcomings in this respect and but for the interruption of the court would have disqualified himself from counseling Stroble, is apparent from his own statements in chambers at the conclusion of the murder trial. At that time, when it became apparent that the trial court wished Matthews to be removed or severely restricted in his further conduct of the defense, Cuff said the following to the court (R. 91):

"I may say in the record, so far as the case is concerned, I have had little or no contact with Mr. Stroble. It would be difficult for me to handle——"

"The Court: I am not asking you to participate in the trial, Mr. Cuff,

If, then, we accept the trial court's statement that Ellery Cuff was counsel for petitioner in this case, the conviction must be reversed for want of a showing on the face of the record that the state provided petitioner with the effective aid of counsel to which he was entitled under the Fourteenth Amendment.

Matthews' Participation

It may well be argued that Stroble's attorney in this trial was not Ellery Cuff, but Al Matthews. He was counsel of defendant's choice, and there was no question of his effectiveness while he acted as such. It was his enforced removal at a most vital juncture in the trial which constitutes the real denial of petitioner's right to counsel.

Stroble, by his own statements, had relied heavily on Matthews' judgment and reposed all his trust and confidence in the Deputy. Nevertheless, Matthews was removed at a time when petitioner was faced with the vital decision of

whether or not to waive the jury on the question of insanity. And this was, in effect, to deprive petitioner of counsel's advice when that advice was needed and counted on most desperately.

For, standing before the trial court was a man concededly of advanced age, semi-literate, and of weakened mentality (R. 416). Having just been convicted of the crime of murder in the first degree, he was asked to make a choice of having the issue of his sanity tried by a judge or a jury. Could there have been a point in the trial more calculated to have a disastrous effect in his fight for his life if his choice was not a deliberate, calculated, and reasoned one? This was a choice which even the trial court recognized as requiring almost professional competence.³³

As this Court said in *Adams v. U. S. ex rel McCann*, 317 U. S. 269, 277 (1942):

"The question in each case is whether the accused was competent to exercise an intelligent, informed judgment—and for determination of this question it is of course relevant whether he had the advice of counsel."

Although Matthews appeared at the sanity hearing, the record shows that he at no time was given the opportunity to

³³ p. 343, Rec. on App.:

"The Witness: (Bliss, special investigator). If I may say, I made no notes at that time, and the discussion of Mr. Cuff with Mr. Stoble concerning what could be brought out or what Mr. Stoble desired to do in regard to whether to continue with the jury or not, that was primarily between these two and I did not make close notes.

"The Court: That was a question of law a little bit above your head.

"The Witness: Yes.

"Mr. Gray: Excuse me, your Honor.

"The Court: A question of law a little bit over Mr. Bliss head. I hope you will pardon me for asking the question.

"Mr. Gray: Of course, your Honor, that is a point which I am seeking to make, if it is over Mr. Bliss head as a man experienced in these matters, certainly it is over defendant's head."

consult with petitioner on the question of the waiver, nor was he ever consulted at all as to this matter, nor as to the course of conduct of the proceedings from that point on.

R. 323:

"(Gray) . . . The defendant's own affidavit states that he never talked to Mr. Hill; that he had never talked to Mr. Matthews regarding the waiver of the jury."

And at p. 336:

"Q. (Gray) When did you first tell Mr. Matthews that the jury was going to be waived?

"A. (Cuff) I didn't tell Mr. Matthews it was going to be waived until after it was done. I never did tell him that. . . ."

The trial court has, in effect, stated that the removal of Matthews was necessary to maintain the decorum of the court (R. 391). Such considerations do not excuse the violation of defendant's constitutional rights.

As was so clearly pointed out in *Lambert v. U. S.*, 101 F. 2d 960, 964 (C. A. 5th, 1939):

"In situations of this kind, while the Judge should certainly preserve and protect the dignity of the court the greatest care should be exercised in doing it, so as not to react upon the defendant himself, who at least, as to the controversy between court and counsel, is a wholly innocent bystander."

It cannot be denied that the trial court's effective removal of Matthews through his demand for the intervention of Cuff "reacted upon the defendant himself" by denying to Stroble the advice and counsel of Matthews, whose opinion he valued most.

Perhaps the clearest statement on the position of this Court on the conduct of a trial court in these circumstances,

is to be found in *Glasser v. U. S.*, 315 U. S. 60, 71, 75, 76 (1942), where this Court reversed a conviction on a record indicating that the trial court of its own initiative interfered with the defendant's choice of counsel by having his attorney represent another defendant in the case. The court, in part, said (all emphasis added):

"No such concern [protecting defendant's right to counsel] on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. The possibility of the inconsistent interests of Glasser and Kretske was brought home to the court, but instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights. For the manner in which the parties accepted the appointment indicates that they thought they were acceding to the wishes of the court. . . . The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused. . . ." (at p. 71)

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. . . ." (at p. 75)

"Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment. This error requires that the verdict be set aside and a new trial ordered as to Glasser." (at p. 76)

Accordingly, petitioner was denied effective aid of counsel at a time when that aid might have spelled the difference between life and death. The admissions of the trial court, of the Public Defender, of Deputy Public Defender Hill, and the testimony of the petitioner himself, make it abundantly clear that in order for the State of California to have fulfilled the requirements of Due Process, either of two courses of action was required to be followed at the time of Cuff's appearance in the trial on the question of insanity:

(ii) If we accept the trial court's statement that Ellery Cuff, the Public Defender, was his attorney, Cuff should have explained to the trial court his lack of familiarity with the "facts, circumstances and laws involved," and requested a continuance to prepare himself, so as to be able to give Stogble the informed, intelligent opinion which the Fourteenth Amendment guarantees to him.³⁴ This Cuff failed to do.

(ii) On the other hand, the trial court might have recognized that the only attorney at this point in the case who was sufficiently familiar with the "facts, circumstances and laws involved" to be able to give "intelligent and informed" advice to petitioner, was Al Matthews. The court then should have permitted Matthews to continue his active participation on petitioner's behalf, since the remedy of contempt was always available if Matthews' conduct interfered with the proper conduct of the court proceedings.

The trial court failed to adopt either alternative. Petitioner was required to make a decision which may in fact have cost him his life, advised by an attorney who was concededly unfamiliar with all the facts and issues in this

³⁴ It is interesting to note that in the judge's chambers Cuff attempted to do just this, but was cut off by the trial court and then apparently suffered a change of heart and took over for Matthews for the remainder of the trial. (See R. 391-392.)

trial, and who had spent, by his own admission, a period of five to ten minutes with his "client."

The State of California was the first state in the Union to authorize its counties to establish the office of Public Defender in recognition of the obligation of government to provide counsel for indigent defendants. Manifestly, nothing could frustrate the attempted statutory discharge of that moral and (in capital cases) Constitutional obligation more than the development of a practice by the courts or the Public Defender to interfere with the conduct of the trial by the attorney accepted by the defendant as his personal counsel, unless the latter's conduct had been in fact prejudicial to the interest of the defendant in carrying on the defense.

Cf. *In re Hough*, 24 Cal. (2d) 522, 528 (1944).

We are certain that this Court would find such a practice abhorrent in a case involving counsel privately retained by the defendant (Cf. *Glasser v. U. S.*, *supra*). Where counsel is a public official, the danger that a trial court may eventually seek to dictate the manner and method of the defense is much more acute because of the inevitability of continued appearances by the same officials before the same judges in criminal actions.

The highly confidential, highly personal nature of the attorney-client relationship³⁵ should not be vitiated by the

³⁵ The Court of Appeals of New York has stated:

"The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practise law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant."

Re Co-Operative Law Co., 198 N. Y. 479, 487; 32 L. R. A. (N.S.) 55, 58 (1910).

fortuitous circumstance of the poverty of the defendant. An indigent person accused of crime is entitled to representation by an *individual* attorney, and is entitled to have a typical relationship with his assigned adviser, including confidence in the continuing responsibility and loyalty of the assigned attorney. The fact that the Public Defender's office is a governmental and charitable agency cannot alter the essence of the attorney-client relationship.

This Court must hold, then, that the obligation to provide effective aid of counsel is not discharged upon the appointment of the Office of Public Defender by the trial court. It is discharged only when that officer establishes an individualized relationship between a member of his staff and the defendant which is not subsequently disturbed or destroyed in the absence of a clear showing that the defendant's interests have been prejudiced by improper conduct of the defense.

Petitioner, therefore, respectfully urges that the failure by the trial court to afford petitioner the advice and counsel of Matthews at the sanity trial, and the trial court's failure to continue the proceedings until such time as Ellery Cuff was sufficiently familiar with the facts, circumstances, and laws involved to give an intelligent, informed opinion on the question of waiver, constituted a denial of petitioner's right to counsel and compels the reversal of the conviction.

IV. Denial of Due Process Results Where a Combination of Illegal Acts and Prejudicial Circumstances Deprived Petitioner of a Fair Trial, Even If Each Particular Aspect of the Procedure Leading to Conviction, Considered Separately, Would Not Invalidate the Conviction.

This case is one in which the petitioner was made the victim of the prosecution's zeal for conviction.³⁶ Com-

³⁶ See *Olmstead v. United States*, 277 U. S. 438, 499 (1928); *McNabb v. United States*, 318 U. S. 332, 343 (1943).

mening with lesser transgressions of the California Penal Code, and culminating in certain violations of petitioner's rights which individually amounted to deprivation of Due Process, the prosecution here by a process of erosion penetrated the bulwark of Due Process, by successively stripping defendant of the protections afforded by law. The question before this Court can only be decided from a consideration of the whole course of the proceedings and cannot be decided by the presence or absence of any single factor. There can be no doubt that a defendant can be deprived of a fair trial by a series of lesser transgressions, even if no one of them considered out of context would vitiate the proceedings.

The record in this case from arrest to conviction discloses a consistent, conscious disregard by the prosecuting officials of the various guaranties of fairness afforded criminal defendants:

1. *Delay in arraignment.* On the day of petitioner's arrest, there was outstanding a warrant returnable to a magistrate sitting on the *seventh* floor of the Los Angeles Hall of Justice (R. 270). Within one hour of the petitioner's arrest, he was taken to the *sixth* floor of the Hall of Justice for interrogation by the District Attorney (R. 60). Twenty-three and one-half hours elapsed between the time of his arrest and the time of his arraignment. This failure to arraign petitioner promptly was a clear violation of Section 859 of the Penal Code of California, which provides for arraignment "without unnecessary delay."

2. *Refusal to permit counsel to consult defendant.* Throughout the period of interrogation of Stroble by the District Attorney, John D. Gray, an attorney at law entitled to practice in the courts of record of California, sought to consult the petitioner (R. 176-180). Mr. Gray had been asked by petitioner's daughter and son-in-law to interview

him. Gray's request to see petitioner was denied and he was told to return the following day (R. 178). Eight hours passed before Mr. Gray was permitted to visit petitioner (R. 180). This conduct by the prosecuting official was in direct violation of Section 825 of the California Penal Code, which provides that any attorney at law entitled to practice in the California courts may visit an arrested individual at the request of any relative of that individual.

3. *Admission into evidence of a confession exacted during a period of illegal detention.* During the period of illegal detention discussed in "1." above, a confession was obtained from petitioner, which was later used at his trial. Were petitioner being tried by a Federal tribunal, the admission of this confession into evidence would have invalidated the conviction. (*McNabb v. U. S.*, 318 U. S. 332 (1943).) While this Court has refused to extend the McNabb rule to the state courts, it has not declared that the use of a confession obtained under such circumstances cannot be considered, along with other factors, in determining whether the accused has been given a fair trial.

4. *The use of a coerced confession.* As delineated in section II above, the prosecution introduced into evidence and relied heavily upon a confession obtained from petitioner under coercive circumstances. The California Supreme Court, while conceding that this confession was coerced, refused to reverse petitioner's conviction on the grounds that the confession introduced into evidence did not constitute reversible error considered in itself. We submit that even if the view of the California Supreme Court is correct, and the effect of the introduction of a coerced confession is regarded as a matter of degree, it must be considered along with the other factors in this situation in determining whether petitioner received a fair trial.

5. *The prosecution inspired publicity.* The District Attorney instigated publicity in the Los Angeles newspapers

was undoubtedly responsible in great degree for the virtual certainty of petitioner's conviction. Petitioner's original confession, later determined to be inadmissible, was released to the public prints by the prosecutor, with the inevitable consequence of bringing it to the attention of substantially all the potential jurors in Los Angeles County (Exhibit "AA," R. 361). Even if this Court should hold that under the circumstances of the public hysteria attendant upon the newspaper treatment of the crime and its aftermath, it was possible for petitioner to obtain a fair trial, the prosecutor's deliberate feeding of material to the newspapers detracted further from the possibility of petitioner's obtaining an impartial trial.

6. *Substitution of counsel at a critical point in the trial.* At the insistence of the trial court, the previously assigned Deputy Public Defender, Matthews, was forced to retire from active participation in the case (R. 371-394). His removal came at the very moment when petitioner was called upon to make the vital decision whether to have the question of his sanity tried by the judge or the jury. In Matthews' place the Public Defender, Cuff, was in effect substituted (R. 323, 336). Yet the Public Defender was, by his own admission, only cursorily familiar with the entire trial to that point (R. 329). If the Court should find that such substitution did not constitute a deprivation of petitioner's right to effective aid of counsel, it is certainly a factor which must be considered in determining whether defendant was given the fair trial guaranteed to him by the Fourteenth Amendment.

The record thus leaves no doubt that the officials of the State were determined to obtain a conviction *and the death penalty* in this case. The rights of the accused to orderly procedure, pre-trial advice of counsel, an unbiased jury, effective representation by diligent counsel, the exclusion of incompetent evidence—these rights, if not denied abso-

lutely, were substantially disregarded by the zealots of the prosecutor's office. This Court has recently observed that:

"Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' "

(*Rochin v. California*, 342 U. S. , 96 L. ed. Adv. Ops. 154, 157 (January 2, 1952).)

This Court cannot but conclude, as it did in *Rochin's* case, that:

"Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. It is conduct that shocks the conscience."

(*Rochin v. California*, 342 U. S. —, 96 L. ed. Adv. Ops. 159.)

Conclusion

The personal attorney for petitioner Stroble, as the record will show, is John D. Gray, Esq. The additional counsel who appeared for petitioner, and whose names appear on the brief, are here, as some of them were before the California Supreme Court, as counsel for the American Civil Liberties Union, by reason of the grave civil liberties and civil rights questions presented in this case.

We are concerned here not just with the manifest unfairness imposed on petitioner Stroble in the trial of this case. Of paramount concern to us is the proposition: that only

this court can correct the flagrant abuse of Due Process against a person accused of crime occurring in this case and recognized, but sanctioned, by the Supreme Court of California.

Charged with *responsible* guilt of a most revolting crime, there was not even the form of an ordered or fair consideration of petitioner Stroble's guilt or innocence, sanity or madness, under the law. Instead, the District Attorney, representing the State of California, coerced a confession and, with all the powerful authority of his office, in most theatrical fashion, spread literally millions of copies of it throughout the County of Los Angeles in the newspapers. Then, with utter disregard of his duty to the defendant before him, the trial judge in arbitrary fashion deprived petitioner Stroble of the right to the effective and substantial aid of the only attorney who had the requisite knowledge and information wherewith to properly advise him, insisted upon the appointment of new counsel entirely unfamiliar with the case, secured Stroble's waiver to his right to a jury trial on the important issue of his sanity, and then without more ado, found him "sane" and responsible for his crime.

Then, four Justices of the California Supreme Court said: "We may agree with the defendant that it was improper for the District Attorney to issue 'play-by-play bulletins' during the course of defendant's confessions" (R. 414); "We may assume that, as a matter of law under the circumstances shown, this first confession was the result of physical abuse or psychological torture or a combination of the two . . . the introduction in evidence of such a confession, if it were material at all, would offend the due process clause of the Fourteenth Amendment" (R. 416). "The record sustains defendant's assertions that Mr. Matthews [the attorney, who as a Deputy Public Defender had personally represented Stroble during the whole trial] was

required to retire from the active representation of defendant because Mr. Cuff and the trial judge disapproved of certain things he had done in connection with the case; . . . " (R. 423). Nevertheless, the California Supreme Court affirmed with an opinion replete with specious reasons the effect of which is wholly subversive of the protection "implicit in the concept of ordered liberty".³⁷

The conviction and judgment, under the circumstances here, must be reversed.

Respectfully submitted,

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³⁷ It is probably superfluous to cite *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).